UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JANET L. HUTCHINSON, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 97B00083
END STAGE RENAL DISEASE NETWORK OF FLORIDA INC.	)	

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS
(June 26, 1997)

MARVIN H. MORSE, Administrative Law Judge

Appearances: John B. Kotmair, Jr., for Complainant
Mark A. Hanley, Esq., for Respondent

I. DISCUSSION

Title 8 U.S.C. § 1324b, which prohibits certain discrimination in the workplace, was enacted as part of comprehensive legislation in 1986 as the Immigration Reform and Control Act (IRCA). IRCA prohibits national origin discrimination in hiring and firing where there are four to fourteen employees, prohibits citizenship status discrimination where there are four or more employees, and, as amended, prohibits employers from requesting more or different documents than are tendered by a new employee in compliance with the employment eligibility verification regimen of 8 U.S.C. § 1324a. As amended, IRCA also prohibits retaliation, intimidation, threat or coercion occasioned by resort to § 1324b relief.

By her Complaint filed in the Office of the Chief Administrative Hearing Officer (OCAHO) on April 2, 1997, Janet L. Hutchinson (Hutchinson or Complainant) claims that End Stage Renal Disease Network of Florida, Inc. (End Stage or Respondent), violated § 1324b by refusing to accept her improvised "statement of citizenship" and "affidavit of constructive notice" presented to avoid tax

withholding.[1] Hutchinson is a United States citizen, employed since July, 1987, by End Stage. Hutchinson's Complaint affirmatively rejects any claims of national origin discrimination or retaliation. Hutchinson asserts that End Stage "refused to accept" her "statement of citizenship" and "affidavit of constructive notice." However, she deleted by pen that portion of the OCAHO pre-printed complaint format that provides the opportunity to allege violation of § 1324b(a)(6), *i.e.*, that the rejected documents were presented "to show I can work in the United States." Complaint, at ¶ 16. End Stage denies liability in its Answer to the Complaint and, by its Motion to Dismiss, contends that the Complaint fails to state a cause of action upon which relief can be granted.

This Complaint is a variant of a number of substantially identical cases asserting administrative law judge (ALJ) jurisdiction under § 1324b. Every such case decided to date resulted in dismissal for failure to state a claim on which § 1324b relief could be granted and/or for lack of subject matter jurisdiction.[2] However characterized by the complainants, these cases turn exclusively on the refusal by employers to participate in schemes to circumvent provisions of the Internal Revenue Code requiring employers to withhold federal income taxes and social security contributions (FICA) from employees'

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[1] Complainant's rationale for her claim to be free from withholding is explained more fully in her charge against End Stage filed with the Special Counsel for Immigration Related Unfair Employment Practices, the agency which receives § 1324b filings in the first instance. 8 U.S.C. § 1324b(b)(1).

[2] *See Kosatschkow v. Allen-Stevens* Corp., 7 OCAHO 938 (1997); *Lareau v. USAir*, 7 OCAHO 932 (1997); *Jarvis v. AK Steel*, 7 OCAHO 930 (1997); *Mathews v. Goodyear Tire & Rubber Co.*, 7 OCAHO 929 (1997); *Winkler v. West Capital Fin. Servs.*, 7 OCAHO 928 (1997); *D'Amico v. Erie Community College*, 7 OCAHO 927 (1997); *Lee v. Airtouch Communications*, 7 OCAHO 926, at 4-5 (1997) (Order Granting Respondent's Request for Attorney's Fees, containing a helpful catalogue of federal court and OCAHO responses to similar tax and social security challenges); *Smiley v. City of Philadelphia*, 7 OCAHO 925 (1997); *Austin v. Jitney-Jungle Stores of Am., Inc.*, 6 OCAHO 923 (1997), 1997 WL 235918 (O.C.A.H.O.); *Wilson v. Harrisburg Sch. Dist.*, 6 OCAHO 919 (1997), 1997 WL 242208 (O.C.A.H.O.); *Costigan v. NYNEX*, 6 OCAHO 918 (1997), 1997 WL 242199 (O.C.A.H.O.); *Boyd v. Sherling*, 6 OCAHO 916 (1997), 1997 WL 176910 (O.C.A.H.O.); *Winkler v. Timlin*, 6 OCAHO 912 (1997), 1997 WL 148820 (O.C.A.H.O.); *Horne v. Hampstead* (*Horne II*), 6 OCAHO 906 (1997), 1997 WL 131346 (O.C.A.H.O.); *Lee v. Airtouch Communications*, 6 OCAHO 901 (1996), 1996 WL 780148 (O.C.A.H.O.), *appeal filed*, No. 97-70124 (9th Cir. 1997); *Toussaint v. Tekwood*, 6 OCAHO 892 (1996), 1996 WL 670179 (O.C.A.H.O.), *appeal filed*, No. 96-3688 (3d Cir. 1996). Complainant's representative, John B. Kotmair, Jr., as Director, National Worker's Rights Committee, represented all but the *Tekwood* complainant. Although varying in detail, these precedents share a common factual nucleus: in every case an employer rejected an employee or applicant's tender of improvised, unofficial documents purportedly exempting the offeror from taxation. The documents are all self-styled "Affidavit(s) of Constructive Notice" [that the offeror was tax-exempt] and "Statement(s) of Citizenship" [purporting to exempt the offeror from social security contributions]. *Hutchinson v. End Stage Renal Disease Network, Inc.* is of this ilk.

wages.[3] No less than the others, Hutchinson's attack on End Stage turns on the specious and discredited rationale that only aliens are subject to withholding. However much her representative, John B. Kotmair, Jr. (Kotmair), may once have given credence to that oft-repeated theory, in the face of unanimous precedent against him, he surely can no longer seriously assert its viability. Moreover, the Hutchinson Complaint explicitly denies hiring or firing discrimination, asserting only citizenship status discrimination and document abuse for failure to honor the "statement of citizenship" and "affidavit of constructive notice." In contrast, 8 U.S.C. § 1324b(a)(6) limits document abuse to demands arising out of the employment eligibility verification regimen of § 1324a(b), which the Complaint literally, by pen, exonerates. Hutchinson's Complaint affirmatively denies that End Stage rejected documents tendered "for purposes of satisfying the requirements of section 1324a(b)." By turning exclusively on documents tendered in compliance with § 1324a(b), subsection 1324b(a)(6) in any case excludes the home-grown documents presented here. The citizenship status claim depends entirely on the discredited proposition that only non-citizens are subject to withholding. Complainant's sole claim is that her documents were given no effect by the employer. That claim lacks § 1324b standing as demonstrated by the cases cited at footnote 2. Accordingly, I find and conclude that no cause of action survives this analysis.

In light of footnote 2 precedents, eight of which issued before the April 2, 1997 filing of Hutchinson's Complaint, this filing is a frivolous and irresponsible action by Complainant's representative.[4] In any ordered system of justice, there comes a time when the public interest compels the swift rejection of claims so obviously lacking in credibility because repeatedly found to be outside the forum's jurisdiction. Judicial economy and efficiency demand no less.

So clearly does Hutchinson's case lack 8 U.S.C. § 1324b viability that there is no need to delay the inevitable outcome. This rapid disposition provides an early opportunity, if she so elects, to seek appellate review.

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[3] 26 U.S.C. §§ 3102(a) (requiring employer to deduct FICA from employees' wages), 3102(b) (imposing liability on employer who fails to withhold FICA taxes from employees' wages), 3402(a) (requiring employer to withhold income taxes from employees' wages), and 3403 (codifying employer liability for failure to withhold income taxes from employees' wages). *See* "The Anti-Injunction Act," 26 U.S.C. § 7421(a) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . . .").

[4] *See Farris v. Lanier Bus. Prods., Inc.*, 626 F. Supp. 1227, 1228 (N.D. Ga. 1986) (relying on *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), where the court granted fees and costs to an employer as a result of the frivolous, unreasonable and litigious actions of its former employee, and stated, "Plaintiff's propensity for meritless litigation reflects poorly upon his good faith in filing the present lawsuit.") (citation omitted), *aff'd*, 806 F.2d 1069 (11th Cir. 1986) (unpublished table decision). Although the *Farris* court addressed the actions of the party, not the representative, the text is particularly apt in the instant case. *See also*, *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 (9th Cir. 1987).

II. ULTIMATE FINDINGS, CONCLUSIONS, AND ORDER

I have considered the pleadings of the parties. All requests not disposed of in this final decision and order are denied.

Respondent's motion to dismiss is granted. The Complaint, having no arguable basis in fact or law, is dismissed because the ALJ lacks subject matter jurisdiction, and because it fails to state a claim upon which relief can be granted under IRCA. 8 U.S.C. § 1324b(g)(3).

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within ***60 days*** to a United States Court of Appeals in accordance with 8 U.S.C. § 1324b(i)(1). *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988); *Fluor Constructors, Inc. v. Reich*, 111 F.3d 94 (11th Cir. 1997) (finding that the merits disposition is the final decision for purpose of computing time for appeal where jurisdiction is retained for adjudication of fee-shifting in an administrative proceeding).

SO ORDERED.

Dated and entered this 26th day of June, 1997.

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Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Final Decision and Order Granting Respondent's Motion to Dismiss were mailed first class, this 26th day of June, 1997 addressed as follows:

Complainant's Representative

John B. Kotmair, Jr.
National Worker's Rights Committee
12 Carroll Street, Suite 105
Westminster, MD 21157

Mark A. Hanley, Esq.
Thompson, Sizemore & Gonzalez, P.A.
109 North Brush Street, Suite 200
Post Office Box 639
Tampa, FL 33601

Office of Special Counsel

James S. Angus
Acting Special Counsel
Office of Special Counsel for Immigration-Related
Unfair Employment Practices
P.O. Box 27728
Washington, DC 20038-7728

Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 2519
Falls Church, VA 22041

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Debra M. Bush
Legal Technician to Judge Morse
Department of Justice
Office of the Chief Administrative Hearing
Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041

Telephone No (703) 305-0861